Affirmed - 14-607 15.
Judge Davis
Field Dissents

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~418.~~ 232

ARTHUR LEARY, GEO. LEARY, AND DANIEL D. LEARY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 24, 1870.

Dec 1871

SUPREME COURT OF THE UNITED STATES.

NO 448.

ARTHUR LEARY, GEO. LEARY, AND DANIEL D. LEARY, APPELLANTS,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLIAMS.

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1 United States Court of Claims. December term, 1868.

ARTHUR LEARY, GEORGE LEARY, DAN'L D. LEARY
vs.
THE UNITED STATES.

To the honorable the judges of the Court of Claims:

Your petitioners, Arthur Leary, George Leary, and Daniel D. Leary, citizens of the United States, and residents of New York City, respectfully represent—

That they were, on the 19th day of November, A. D. 1862, the owners of the steamboat "Mattano," then lying in the port of Port Royal; that on said day the said vessel entered upon the service of the United States under a regularly executed charter-party, made and entered into by and between the United States, through C. E. Fuller, chief quartermaster 10th Army Corps, and your petitioners, through their agent, H. E. Borchner, a copy of which said charter is hereto attached, and made part hereof, marked "A." That, by the terms of said charter, the United States agreed to pay the sum of two hundred and fifty dollars for each and every day said vessel was employed in said service, which amount your petitioners allege was but a just and reasonable compensation therefor.

Your petitioners further show that said vessel continued, from the date of her charter aforesaid, until the 12th day of May, 1863, to serve the United States under said charter, and was fully paid for said services at the rate per diem fixed by said charter; and your petition-

2 ers further allege that, on said last-mentioned date, viz, the 13th day of May, 1863, while said vessel was lying at the wharf at Port Royal, South Carolina, the captain and master commanding said vessel received an order from the acting harbor-master, an officer in the employ of said United States, acting directly under and by direction of the United States quartermaster at that port, to back the said vessel out of the berth or slip she then occupied to give place for another vessel in the service of the United States. That, at the time said order was given, the tide was low and a high sea on, making the danger in complying with said order extra hazardous. That the master of said vessel, representing your petitioners, protested against attempting the execution of said order; but the harbor-master still insisting upon the execution of said order, notwithstanding the condition of the tide and sea, and the said master, still protesting, commenced backing out, in obedience to said order, and in as skillful and seaman-like manner as was possible; but your petitioners charge that in the said attempt to execute said order the said vessel struck upon a sunken anchor and immediately sunk, and this through no fault or neglect on the part of the master of said vessel or any of her crew; but on the contrary, as your petitioners aver, through the fault of the United States, as represented by their proper agents.

And your petitioners further aver, that the said anchor which caused the sinking of said vessel, was placed there by the proper officers of the United States in charge of the shipping interests of said port, as a mooring for vessels, and had been previously marked, as your petitioners are informed, by a can-buoy, but that said buoy had become displaced sometime previously to said accident, and wholly disappeared, and nothing remained to mark this hidden danger. That said anchor

was placed there by the United States, and it was their duty to so mark it as to warn approaching vessels of the presence of danger. That your petitioners had no knowledge of the location of said anchor, or that an anchor had been so placed, nor had the master of said vessel or the crew thereof any such knowledge.

3 Your petitioners further charge that, by the express stipulations of said charter-party, as well as by the implied undertakings of the United States in the premises, the United States became and are liable to your petitioners for all damage to them growing out of said accident and loss of said vessel, and that said sinking of said vessel cannot be, and in justice and equity ought not to be, brought within the risks assumed by your petitioners.

Your petitioners further state that, immediately after the sinking of said vessel, the master thereof reported the same to the quartermaster, who ordered the steam derrick-vessel "Dirigo" to raise the said "Mattano," but that after many unavailing efforts, resulting only in great damage to the cabin and hull of said vessel "Mattano," the "Dirigo" hauled off, unable to accomplish its purpose. That the said vessel "Mattano" lay in this condition, neither your petitioners nor the United States being able to rescue her from the perils of the sea, until sometime in the following August the United States succeeded in raising said vessel and floating her to Beaufort, near Port Royal aforesaid. That by this time all the upper works of said steamer had been carried away by the winds and waves, so that nothing remained of her save the bare hull, engine, and boiler, and these in a greatly-damaged condition.

Your petitioners further show that at the time there were neither men nor materials at Port Royal to make repairs to said vessel, and no means by which they could refit said vessel for use, and they therefore sent from New York City to Port Royal both men and material, and caused such repairs made to the hull as to enable petitioners to take the wreck of said vessel to some port where further repairs could be made, and they for that purpose took said hull to the port of New York, which place was reached with the remaining portion of said vessel sometime in the month of September of said year, and immediately placed her upon a marine railway, and caused the said vessel to be rebuilt as rapidly as was possible under the circumstances.

4 Your petitioners further show that, upon careful consideration, and after taking the opinion of experts, it was found best, for the interests of all concerned, to rebuild said vessel as a tow-boat and not as a passenger-vessel, as she was prior to said sinking; that the work proceeded with all possible despatch, and said vessel was again ready for service on the 10th day of December, 1863, the earliest period at which she could have been made available to petitioners.

Your petitioners further show that the necessary cost of said repairs, and the actual outlay of money for workmen and materials in and about the repairing of said vessel amounted to the sum of nineteen thousand eight hundred and forty-seven dollars and fifteen cents, ($19,847 15;) and that your petitioners paid out, in addition to said last amount, and for a necessary crew, engineer, mate, master, &c., during the period named for said repairs, the sum of two thousand seven hundred and ninety dollars, as wages, from the time of said sinking until the vessel was again ready for service; and your petitioners aver that the United States are liable to your petitioners for these two amounts, and justly owe the same to your petitioners; wherefore, they ask judgment therefor.

And your petitioners further charge that, in consequence of said sinking and in the necessary refitting of said vessel as a tow-boat, she was

greatly reduced in value and worth to your petitioners; that, prior to said sinking, she was an elegantly-equipped passenger-steamboat, capable of really earning, under charter to the United States. two hundred and fifty dollars per day, and worth in market the sum of fifty thousand dollars; and that, after being refitted, as aforesaid, your petitioners were enabled to recharter her to the United States for the sum of one hundred dollars per day only, and that the market value of said vessel had been, by said necessary refitting, reduced at least twenty thousand dollars, and for this amount of reduction in the value of said vessel your petitioners believe the United States liable to petitioners, and for this amount they ask judgment.

And your petitioners further allege that, in addition to the damage caused to petitioners by reason of said necessary outlays in repairs, and by said reduction in the value of said vessel, your petitioners
5 were further damaged by the loss of earnings of said vessel during the period she was undergoing repairs as aforesaid, and was kept from performing her usual duties, to wit, from the 12th day of May, 1863, until the 10th day of December, 1863; and petitioners say that said vessel could and would have justly and well earned to her owners, during said period, the sum of about fifty-three thousand dollars, and being deprived by the act of the United States from doing which, involved the said United States in the further liability to your petitioners for said last-named sum; and your petitioners therefore pray judgment therefor.

Your petitioners further allege that they and each of them have at all times borne true allegiance to the United States, and have never, directly or indirectly, given aid or comfort to the rebellion against said United States; that they have made application to the proper Department of the Government for payment of their said claim against the United States, but without success; your petitioners, therefore, by reason of the matters and things herein set forth, and by reason of the several distinct claims above set forth, ask judgment for the whole amount claimed, viz., the sum of ninety-five thousand six hundred and thirty-seven dollars and fifteen cents.

CHIPMAN, HOSMER & CO.,
Solicitors for Claimants.

STATE OF NEW YORK,
City and County of New York, ss:

Personally came before me, H. Erskine Smith, a notary public in and for said county, New York, David D. Leary, who, being first duly sworn, says that he is one of the claimants in the foregoing petition named; that no assignment of the claims therein stated, or any part thereof, has been made except as in said petition stated; that the amounts claimed are justly due petitioners, after allowing all just offsets; and that he believes the matters and things therein stated are true.

DANIEL D. LEARY.

6 Subscribed and sworn to before me this 4th day of December, A. D. 1868.

[L. S.] H. ERSKINE SMITH,
Notary Public, N. Y. C.

EXHIBIT A.

This charter-party, made on the nineteenth day of November, in the year one thousand eight hundred and sixty-two, between H. E. Bockner,

agent for D. D. Leary, the owner of the steamboat Mattano, of New York, of the burthen of two hundred and fifty tons, or thereabouts, now lying in the harbor of Port Royal, South Carolina, of the first part, and Captain C. E. Fuller, assistant quartermaster in the United States Army, for and on behalf of the United States of America, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, does covenant and agree, on the hiring or chartering of the said vessel unto the said party of the second part for the purpose of plying in the aforesaid harbor of Port Royal, South Carolina, or for any other service that the said party of the second part may designate, on the terms following, that is to say:

First. The said party of the first part does engage that the said vessel, in and during the existence of this charter, shall be kept tight, staunch, well-fitted, tackled, and provided with every requisite, and with men and provisions necessary.

Second. The said party of the first part does further engage that the whole of said vessel (with the exception of the necessary room for the accommodation of the crew and the storage of the said cables and provisions) shall be at the sole use and disposal of the said party of the second part during the existence of this charter; and that no goods or merchandise whatever shall be laden on board otherwise than from the said party of the second part or his agent, without his consent, on pain of forfeiture of the amount that may become due on this charter.

Third. The said party of the first part does further engage to receive on board the said vessel, during the existence of this charter, all lawful goods and merchandise, as the said party of the second part or his agent may think proper to ship. And the said party of the second part, for and in consideration of the covenants and agreements to be kept and performed by said party of the first part, does covenant and agree with the said party of the first part, to charter and hire the said vessel as aforesaid, on the terms following, that is to say:

First. The said party of the second part does engage that the said party of the first part shall receive the sum of two hundred and fifty dollars per day for each and every day the vessel may be retained under this charter, payable at the end of every month. The United States to supply the coal.

Second. In case the said vessel, while executing the orders of the said party of the second part, should be destroyed or damaged by a hostile force from any quarter, or by being compelled by the party of the second part to run any extraordinary marine risk, then the party of the first part is to be indemnified; that is to say, in case of loss, her value is fixed at twenty-six thousand dollars, and in case of damage, the amount to be assessed by a board of survey, which shall be convened on her, after her arrival at Port Royal, South Carolina, or other friendly port, at the expense of the said party of the second part.

It is understood between the parties to this agreement, that the said party of the second part shall have the right to discharge the said vessel from the obligations existing under this charter at the expi-
7 ration of one month from date of this charter, and when such notice of discharge is given, pay shall cease being due the vessel.

No member of Congress shall be admitted to any share or part in this contract, or any benefit to arise therefrom.

In witness whereof the parties hereunto have set their hands and

seals, the day and year above written, at Port Royal, in the State of South Carolina.

H. E. BORCHNER, [L. S.]
Agent for Dan'l D. Leary.
C. E. FULLER, [L. S.]
Chief Q. M. 10th Army Corps.

Witnesses to Capt. Fuller's signature:
CH. C. DARLING.
G. W. SERRELL,
Col. and Chief Eng. U. S.

Approved:

J. M. BRANNAN,
Brig. Gen'l Com'd'g Dep't.

HEADQUARTERS DEPARTMENT OF THE SOUTH,
Hilton Head, South Carolina, November 24, 1862.

8 In the United States Court of Claims. December term, A. D. 1868.

ARTHUR LEARY ET AL.
vs.
THE UNITED STATES. } No. 3706.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimants herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimants in the sum of $95,637 15, the said defendants say that they are not indebted to the said claimants in said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

9 United States Court of Claims.

ARTHUR LEARY ET AL.
vs.
THE UNITED STATES. } 3706.

And the defendants, by their Attorney General now come, and, by leave of the court, say that the said claimants ought not further to maintain his said action because—

1. While the claim presented in the petition is such as is ordinarily settled in an Executive Department, the petition does not set forth the decision thereon of the proper Department of the Government, to which application, was (as is alleged) made for the payment of the claim. (Rule 2.)

2. The petition does not set forth a full statement of the action on the claim therein presented by any Department of the Government, as required by sec. 1, of the act of Feb'y 4, 1855.

3. The evidence in the case does not show that any such application has ever been made to any Department of the Government, whether with or without success, or any action whatever thereon, without which action this court has no lawful jurisdiction in the case.

And the said defendants pray judgment, &c.

T. LYLE DICKEY,
Ass't Att'y Gen'l.

10 United States Court of Claims. December term, A. D. 1869.

DANIEL D. LEARY
vs.
THE UNITED STATES. } No. 3706.

Amended petition.

To the honorable the judges of the Court of Claims:

The amended petition of Daniel D. Leary respectfully represents: That he was, on the nineteenth day of November, A. D. 1862, the registered owner of the steamer Mattano; that on said day the said vessel entered upon the service of the United States, under and by virtue of a regularly executed charter-party, signed by H. E. Borchner, on the part of your petitioner, and by C. E. Fuller, chief quartermaster 10th Army Corps, on behalf of the United States, a copy of which said charter-party is attached to and made part of the original petition in this cause, marked "A." Your petitioner further represents that, at the time said charter-party was executed, and ever since, the said vessel was and has been the property in equal parts of your petitioner and of Arthur Leary and George Leary, and that your petitioner will be required to account with his said coöwners for any moneys he may receive in this suit.

Your petitioner, therefore, asks judgment on the cause of ac-
11 tion as in said original petition set forth, and for such other and further relief as may be consonant with equity and good conscience.

CHIPMAN & HOSMER,
Attorneys for Petitioner.

WASHINGTON COUNTY, *District of Columbia:*

N. P. Chipman, being duly sworn, says he is one of the attorneys in the foregoing action, and that the matters and things set forth in said amended petition are true, as he verily believes.

N. P. CHIPMAN.

Subscribed and sworn to before me, this 24th day of January, A. D. 1870.

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

12 In the Court of Claims.

ARTHUR LEARY, GEORGE LEARY, AND DANIEL D. Leary
vs.
THE UNITED STATES. } 3706.

And now, to wit, 14th day of February, A. D. 1870, the court, upon due consideration of the premises, find in favor of defendants, and do order, adjudge, and decree that the said claimants take nothing by their suit and that their petition be dismissed.

By the court:

A true copy of record.

13 In the Court of Claims.

ARTHUR LEARY, GEORGE LEARY, AND DANIEL D. Leary
vs.
THE UNITED STATES. } 3706.

Come now the petitioners in the above entitled cause, and, by their attorneys, move the court for the allowance of an appeal to the Supreme Court of the United States, from the judgment dismissing the petition in the above-entitled cause, rendered by the Court of Claims on the 14th day of February, A. D. 1870.

CHIPMAN & HOSMER,
Att'ys of Claimants.

Filed in clerk's office March 21, 1870.

THO'S J. DURANT,
CHA'S F. PECK,
of Counsel.

Ordered that the appeal as prayed in this cause be allowed.

By the court:

MARCH 21, 1870.

14 United States Court of Claims.

ARTHUR LEARY
vs.
THE UNITED STATES. } No. 3706.

In this case the court find the facts to be as follows:

1st. On the 19th of November, 1862, the petitioner chartered to the defendants, the steamboat Mattano, by a contract, in writing, which is hereunto annexed, and marked A, appended to the petition. A material part of the charter which is brought into discussion, is the second clause, which is in these words:

15 2nd. In case the said vessel, while executing the orders of the said party of the second part, shall be destroyed or damaged by a hostile force from any quarter, or by being compelled by the party of the second part to run any extraordinary marine risk, then the party of the first part is to be indemnified; that is to say, in case of loss, her value is fixed at twenty-six thousand dollars, and in case of

damage, the amount to be assessed by a board of survey, which shall be convened on her after her arrival at Port Royal, South Carolina, or other friendly port, at the expense of the said party of the second part.

2. While under charter, the Mattano was employed in the harbor of Port Royal, South Carolina, and was lying at one of the wharves there on the 12th May, 1863. On that day the military harbor-master, Captain King, ordered the Mattano out to make room for another steamer, the General Hunter. The captain of the Mattano objected to
16 going out, as the tide was very low; and, as he believed, there was a considerable breeze from the N. N. W. Captain King, the harbor-master, ordered the Mattano peremptorily to back out, and her captain let go his lines and backed out.

3. In thus backing out the Mattano struck upon the fluke of a sunken anchor deeply imbedded in the sand, and she sank in fifteen minutes, swinging round with her bow to the shore, and her stern off; the tide was young flood, and had not then risen more than an inch or two.

4. This was a mooring anchor, and had been placed there by Captain Saxton, the United States quartermaster, to moor the big ocean steamers to prior to November, 1862, and had a buoy attached to it which showed its position; but, about the first of January, 1863, the buoy had gone adrift in a gale of wind, and had never been replaced, and
17 there was nothing at the time of the accident to warn vessels of the locality of the sunken anchor. No one could have pointed out where the anchor was at that time. The captain of the Mattano knew of the existence of the anchor, but thought he was a long way outside of it. There was no unskillfulness in executing the order to back out.

5. The Mattano was removed from where she sank by a wrecking-boat sent there by the Secretary of War, and under orders from the quartermaster, sometime about July 4th, 1863. And the cost of this service was paid by the United States. A gale of wind, which came on after she sank, did damage to her by carrying off her upper works, wheel-house, and joiners' work clear to the hull.

6. No board of survey was convened to assess the damage done to the Mattano as the charter-party provides. The officers of the United
18 States at Port Royal refused to acknowledge any liability on the part of defendants growing out of the wreck.

7. After the vessel had thus been raised by the defendants the petitioner took possession of her, carried her to New York, and there had her put in order in such way as to leave her fit for a towing or carrying vessel, but not fitted for passengers. These repairs were completed on the 10th of December, 1863, and cost the petitioners for her restoration $18,265 25; and she was worth then $12,000 less than before the accident. From the time this occurred, 12th of May, 1863, until the time the repairs were completed, December 10th, 1863, there were 214 days. The repairs were made as rapidly and as economically as possible. She was chartered again to the defendants in May, 1864, at $100 a day.

8. The petitioners have at all times borne true allegiance to the
19 United States, and they have not, in any way, voluntarily aided, abetted, or given encouragement to the rebellion against the said Government.

That the claimant has at all times borne true allegiance to the Government of the United States, and that he has not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

The court find as matter of law that the disaster was a usual marine

disaster, which is covered by ordinary marine policies of insurance, and not such extraordinary marine risk as is contemplated in the charter-party; and if the owners neglected to protect themselves against such perils by insurance the law makes them their own insurers, and they must bear the loss. They cannot cast their negligence on the shoulders of the Government, and compel it to bear losses it never assumed.

By the court.

In the Court of Claims.

ARTHUR LEARY ET AL.
vs.
THE UNITED STATES. } No. 3706.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimants for the allowance of an appeal, as filed in the clerk's office March 21, 1870, and of the order of the court of March 21, 1870, allowing the same; of the findings of fact and the conclusions of law on said facts on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 24th day of December, 1870.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 448. Arthur Leary, George Leary, and Daniel D. Leary, appellants, vs. The United States. Court of Claims. Filed 24th December, 1870.



In the Supreme Court of the United States.

DECEMBER TERM. 1871.

ARTHUR LEARY AND OTHERS, APPELLANTS,

vs.

THE UNITED STATES.

No. 232.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF COUNSEL OF APPELLANTS.

The petitioners in the court below claimed ninety-five thousand six hundred and thirty-seven dollars and fifteen cents for damages growing out of the charter to the United States of their steamer called the Mattano.

Facts.

The petitioners on the 19th November, 1862, chartered to the United States the steamer Mattano for the military service of the Government, at the rate of two huudred and fifty dollars dollars per day for every day the vessel should be retained in service.

It was a part of the contract that "in case the vessel, while executing the orders of the United States, should be destroyed or damaged by a hostile force from any quarter, or by being compelled to run any extraordinary marine risk, then the petitioners were to be indemnified, that is to say, in case of loss, the value of the vessel was to be

fixed at twenty-six thousand dollars, and in case of damage, the amount to be assessed by a board of survey, which shall be convened on her, after her arrival at Port Royal, South Carolina, or other friendly port, at the expense of the United States."

See Charter-party, Rec., p. 2, Article Second.

See Rec., pp. 7 and 8, Findings First and Second.

During the charter, while the Mattano was lying at a wharf at Port Royal, S. C., the military harbor master ordered the master of the Mattano to back out his boat, to make room for another. The master of the Mattano objected to doing so, as it was dangerous, but he was ordered peremptorily to do it; in executing this order, the Mattano struck on the fluke of a sunken anchor, which caused her to sink.

See p. 8, Findings 2 (bis) and 3.

This accident was not due to any want of skill on the part of the master and crew of the Mattano. The sunken anchor on which she struck, had been placed there prior to November, 1862, to hold the ocean steamers, and had been designated by a buoy attached to it, and this buoy, about 1st January, 1863, had been swept away by a gale and not replaced, so that at the time of the accident there was nothing to warn vessels of the position of the sunken anchor.

Rec., p. 8, Finding 4.

The Mattano was raised and removed by orders of the Secretary of War, and at the cost of the Government, having been greatly damaged in the meantime by a gale of wind taking off her upper works, while in her sunken condition. No survey was held on her as provided for in the charter-party, as the officer of the United States at Port Royal refused to recognize any liability.

Rec. p. 8, Findings 5 and 6.

After the Mattano was raised, the petitioners took her

to New York, and there had her put in condition to serve as a tow boat. These repairs which, were completed on 10th December, 1863, cost petitioners $18,265 25, and she was then worth $12,000 less than before the accident, and from the date of the accident, 12th May 1863, until 10th December, 1863, there were 214 days; the repairs having been made as rapidly and as economically as possible.

Rec., p. 8, Finding 7.

She was chartered a second time to the United States in May, 1864, at $100 a day.

Rec., p. 8, Finding 7.

Points.

First. The damage sustained by the Mattano arose from her being compelled to back out from her birth at the wharf at Port Royal, when the water was low, and in spite of the remonstrance of the master that the movement was dangerous.

This was such an extraordinary marine risk, as the United States in insured against in the charter-party, Rec., p. 4, and it occured where she was employed to do service, as the charter-party states her to be hired for the purpose of plying in the harbor of Port Royal. See Rec., p. 4, lines 11 and 12.

Second. It was a risk which, in the language of the contract, the Mattano was *compelled* to run, for being in military service, and performing duty in the harbor of Port Royal, the peremptory order of the military harbor master was what she was compelled to obey, and whatever risk there was in it, *that* she was compelled to run.

Third. The United States by the contract, insured the petitioners against such risk. This liability is tested by the principles of the law of marine insurance.

The court below drew a distinction between ordinary or extraordinary marine disasters, and considering the

one now under discussion as belonging to the former category, held that the United States was not liable as underwriter. But this is certainly an error.

The contract in specifying "extraordinary marine risks," does no more than is done by all marine policies. The underwriter is liable only for loss and damage of an extraordinary kind.

See 1st Phillips on Insurance, p. 617, Art. 1086, and the Language of Thompson, J. and Washington, J. then quoted.

Fourth. This accident occurred because the Mattano was compelled to run the risk of low tide and what that danger carried with it.

Taking the ground in consequence of the falling of the tide as one of the marine risks the underwriter insures against.

See 1st Phillips on Ins., p. 627.

"A transport in Government service was insured for twelve months, during which she was ordered into a dry harbor, the bed of which was hard and uneven, and on the tide having left her, she received damage by taking the ground; held that this was a loss by a peril by the sea."

Fletcher *vs.* Inglis, Second Barn. and Ald, 315.

Fifth. As the officers of the Government at Port Royal refused to acknowledge any liability for the damages, no assessment could be made by a board, as provided for in the contract.

Sixth. As the contract of marine insurance is a contract for indemnity, the United States are clearly liable for the costs of repairs and injury, the value of which are found as facts in the 7th findings of the court below. See Rec., p. 8.

Seventh. The United States are further liable for the loss of time.

The boat, according to the contract, was to be under

pay until notice of discharge was given by the United States, (See Rec., p. 4, at foot,) and no such notice was given.

Eighth. As the contract bound petitioners to keep the vessel in repair, and as the United States were bound to pay for every day she was retained in service, the time occupied in repairs is to be included.

See Ripley *et al. vs.* Schaife, 5th Barn and Cress, p. 167.

Ninth. By the legal effect of the contract, the United States became the owners of the Mattano *pro hac vice*, for the whole of the vessel is let to the United States, and the purpose of the service necessarily implies exclusive possession and control.

See Drinkwared *vs.* Brig Spartan, Ware, 158.

See Gracie *vs.* Palmer, 8 Wheaton, 633.

McIntyre *vs.* Boune, 1st Johnson, N. Y., p. 239.

Trinity House *vs.* Clark, 4th Maule and Selwyn, p. 288.

Respectfully submitted,

CHIPMAN & HOSMER,

THOMAS J. DURANT.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

ARTHUR LEARY AND OTHERS
vs.
THE UNITED STATES.
} No. 232.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

DECEMBER TERM, 1871.

ARTHUR LEARY AND OTHERS
vs.
THE UNITED STATES. } No. 232.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The steamboat Mattano was let to the United States under a charter-party "for the purpose of plying in the aforesaid harbor of Port Royal, South Carolina, or for any other service that the said party of the second part may designate," and it was agreed that "In case the said vessel, while executing the orders of the said party of the second part, should be destroyed or damaged by a hostile force from any quarter, or by being compelled by the party of the second part to run any extraordinary marine risk, then the party of the first part is to be indemnified." (See Record, pp. 3, 4.) While under charter, the Mattano was employed in the harbor of Port Royal, and was lying at one of the wharves there on the 12th of May, 1863, when the military harbor master ordered her out to make room for another steamer. The captain of the Mattano objected as the tide was very low, and he believed there was a

considerable breeze from the N. NW. Captain King ordered the Mattano peremptorily to back out, and her captain let go his lines and backed out; in thus doing, the vessel struck upon the fluke of a sunken anchor and sunk in fifteen minutes. The captain of the Mattano knew of the existence of the anchor, but thought he was a long way outside of it. There was no unskilfulness in executing the order. The Court of Claims found as matters of law that the disaster was a usual marine risk and that the Government is not answerable therefor.

ARGUMENT.

The charter-party did not make the Government owners of the vessel for the voyage, but only hirers, paying a compensation for the use of the vessel, leaving her in the possession of the general owners, and the Government is only liable for damage done to the vessel by a hostile force or by an extraordinary marine risk.

In order to decide what risks are covered by the term "extraordinary marine risk," we must consider the purpose for which the vessel was chartered, and likewise interpret these words in connection with the other provisions of the paragraph in which they are found. The vessel was chartered to ply in the harbor of Port Royal, and the Government agreed to indemnify the owners for damage done by a "hostile force," that is, military risk, and by any "extraordinary marine risk." Any risk ordinarily arising from the service in which the vessel was employed and for which she was chartered cannot be considered as "an extraordinary risk." Indeed, from

the connection of the words "extraordinary risk" with "damage done by a hostile force," it would seem that the parties did not contemplate that kind of risk which any vessel, without regard to the purposes for which she was used, might incur, but some risk growing out of her use for military or semi-military purposes and by a Government then actually engaged in waging war; that is, a risk different in kind and not only in degree from the ordinary marine risk.

What is an extraordinary marine risk must be determined by the particular circumstances of each case, and confining it to the proximate cause of the loss.

3 Kent, Com., (6th ed.,) 302.

In the present case, the Mattano, while employed in the service for which she was expressly engaged, plying in Port Royal harbor, was lost by striking against a sunken anchor, the existence of which was known to the captain, who miscalculated as to where it was. This was the direct proximate cause of the loss. It is true that the captain protested against the order to back out on account of the then state of the wind and tide; but there is nothing to show that these contributed to the loss, in any way. Had the captain calculated correctly as to the position of the anchor, the vessel would have backed out with safety. Such a loss cannot be regarded as other than an ordinary peril of navigation.

See, also, Reed *vs.* United States, 11 Wallace, 591.
United States *vs.* Kimball, 13 Wallace, 636.

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